Supreme Court, U.S.
FILED

051092 FEB 23 2006

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No. 05-___

[CORRECTED]

IN THE

Supreme Court of the United States

Jean Mouelle and Germaine Mouelle,
Petitioners,

v.

Alberto R. Gonzales.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 23, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Given Congress's directive in 8 U.S.C. 1255 that paroled aliens may apply to adjust their status under specified conditions, may the Attorney General nonetheless categorically prohibit paroled aliens in removal proceedings from making such an application?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jean and Germaine Mouelle respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-13a) is published at 416 F.3d 923. The Eighth Circuit's order denying rehearing and rehearing en banc (Pet. App. 14a) is unpublished. The order of the Board of Immigration Appeals ("BIA") denying petitioners' motion to re-open their removal proceedings (Pet. App. 15a-16a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2005. The petition for rehearing and rehearing en banc was denied on October 26, 2005. On January 18, 2006, Justice Thomas extended the time to file this petition to and including February 23, 2006. App. 05A644. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1255, provides, in relevant part:

> (a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 1154(a)(1) of this title or [sic] may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is

eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 C.F.R. 1245.1(c) provides, in relevant part:

> The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act [8 U.S.C. 1255]:
>
> * * *
>
> (8) Any arriving alien who is in removal proceedings pursuant to section 235(b)(1) or section 240 of the Act * * *.

STATEMENT

In 8 U.S.C. 1255, Congress expressly provided that "paroled" aliens – that is, aliens who have been given temporary leave to enter the United States – may apply to adjust their status and become legal residents if they meet specified criteria. Notwithstanding this specific statutory directive, in 1997 the Attorney General issued 8 C.F.R. 1245.1(c)(8), which categorically prohibits paroled aliens from even applying to adjust their status if they are in removal proceedings at the time of the application.[1] The

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[1] As part of the Homeland Security Act of 2002, the operations of the Immigration and Naturalization Service ("INS") were transferred to the Department of Homeland Security ("DHS"), and the regulations were duplicated and renumbered. See Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.* As the court of appeals explained (Pet. App. 5a n.6), there are now, as a result, two functionally identical provisions: 8 C.F.R. 1245.1(c)(8) and 8 C.F.R. 245.1(c)(8). Section 245.1(c)(8) applies to the United States Citizenship and Immigration Services of the DHS, while Section 1245.1(c)(8) applies identical requirements to the immigration courts and the Board of Immigration Appeals ("BIA") of the Department of Justice. Accordingly, for ease of reference,

Eighth Circuit in this case upheld the regulation as valid. In so holding, the court recognized that its decision conflicted with the precedent of the First Circuit, which struck down the regulation as an invalid construction of Section 1255; two other circuits have subsequently joined the First Circuit in holding the regulation invalid.

1. Section 1255 comprehensively addresses the categories of aliens eligible, and ineligible, to apply for adjustment of status – *viz.*, the aliens able to apply for permanent resident status without having to leave the country. For example, the statute expressly excludes from eligibility alien crewmen, aliens continuing or accepting unauthorized employment, aliens admitted in transit without a visa, 8 U.S.C. 1255(c), and aliens who were married in the United States while in judicial proceedings, *id.* § 1255(e). Congress added further precision to this statutory scheme by creating exceptions to the exclusions – that is, restoring the eligibility of certain aliens who would otherwise be ineligible to apply for adjustment of status. See, *e.g.*, *id.* § 1255(i) (aliens rendered ineligible by § 1255(c) may nonetheless be eligible to apply for adjustment of status if specified criteria are met). See also *id.* § 1255(e)(3) (aliens who would otherwise be ineligible under § 1255(e) may apply for adjustment of status provided they entered into marriage in good faith).

By contrast, and particularly relevant to this case, Congress in Section 1255 specifically included among those eligible to apply for adjustment of status an "alien who was * * * paroled into the United States" – that is, an alien who was given temporary leave to enter the United States, see 8 U.S.C. 1182(d)(5)(A). Section 1255 in this respect departs from prior law. Until 1960, an alien who wished to become a permanent resident, but whose non-immigrant visa had expired, was required to leave this country and obtain an

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petitioners follow the court of appeals' practice of citing 8 C.F.R. 1245.1(c)(8) to encompass both regulations.

immigrant visa from a U.S. consular post abroad. See *Succar* v. *Ashcroft*, 394 F.3d 8, 13 (CA1 2005). This requirement imposed an unnecessary hardship on aliens who were otherwise eligible for permanent resident status. In 1960, Congress provided relief, amending 8 U.S.C. 1255(a) to expressly include paroled aliens in the category of individuals eligible to adjust their status while remaining in the United States.

Since its extension of eligibility for adjustment of status to paroled aliens in 1960, Congress has amended the provisions governing the eligibility criteria for other classes of aliens – including two amendments to Section 1255(a) itself – but has kept the eligibility of paroled aliens intact. See *Succar*, 394 F.3d at 24 n.20 (citing Historical and Statutory Notes, 8 U.S.C. 1255).

While specifying precisely who is eligible and ineligible to apply for adjustment of status under Section 1255, Congress vested the Attorney General with discretion to decide whether to grant the adjustment of status. See 8 U.S.C. 1255(a). Congress also granted the Attorney General the authority to promulgate regulations to guide the exercise of that discretion. See *id.* § 1103(g)(2).

In 1997, pursuant to her authority under 8 U.S.C. 1103(g)(2), the Attorney General issued new regulations that she indicated were intended to implement the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). Although Congress in the IIRIRA had neither imposed any limitations on the eligibility of paroled aliens to apply for adjustment of status nor given "the Attorney General discretion to redefine eligibility," *Succar*, 394 F.3d at 35, the Attorney General nonetheless provided, in 8 C.F.R. 1245.1(c)(8), that "[a]ny arriving alien who is in removal proceedings" is categorically ineligible to apply for adjustment of status. The category of arriving aliens in removal proceedings prohibited from applying for adjustment

of status under the regulations includes "paroled aliens," see 8 C.F.R. 1001.1(q), because they are subject to statutorily mandated removal proceedings if not "clearly and beyond a doubt" entitled to admission, see 8 U.S.C. 1225(b)(2)(A).

2. Petitioner Jean Mouelle is a citizen of the Republic of Congo. Pet. App. 1a. In 1989, he entered the United States on a J-1 student exchange visa to pursue a Ph.D. in forestry. *Id.* 1a-2a. His wife, petitioner Germaine Mouelle (who is also a citizen of the Republic of Congo) entered the country as his dependent. *Id.* 2a.

After their visas expired, petitioners attempted to obtain permanent resident status. In 1994, Dr. Mouelle won the diversity lottery, a program that awards visas to immigrants from countries from which fewer than 50,000 immigrants have been awarded resident status in the preceding five years. Despite Dr. Mouelle's best efforts, however, the Congolese government failed to provide him with the necessary paperwork before his opportunity to obtain the diversity visa expired. Pet. App. 2a n.2.

On May 31, 1996, Dr. Mouelle filed an application for asylum and withholding of removal. Pet. App. 2a. Because members of his tribe were being targeted by the Congolese government, Dr. Mouelle averred that he and his family would be persecuted if they returned to Congo. See Petrs. Mot. for Stay of Removal 3.

In April 1998, the Immigration and Naturalization Service ("INS") began removal proceedings against petitioners. Pet. App. 2a. The charges (as subsequently amended) asserted that petitioners had failed to present a valid non-immigrant visa or border-crossing identification card when they had re-entered the United States from Canada after a one-day 1997 trip. See *id.* 3a.[2]

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[2] Petitioners had made the trip so that Dr. Mouelle could conduct field research and assist a class he was teaching. Pet. App. 2a. To ensure that they would be able to re-enter the country,